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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

CHRYSLER CORPORATION,

Petitioner,

v.

THE UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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I. INTRODUCTION

Businesses engaged in international trade must be able to rely on the clear language of the trade law and relevant regulations. The enactment of a statute with ambiguous language or the enforcement of trade regulations with unforeseen administratively or judicially imposed pre-conditions is disruptive to the business certainty that is necessary in trade among nations. For that reason, the United State has fostered "transparency" in trade laws and administration in its approach to multilateral trade since the Second World War. Chrysler submits that the position of the United States Customs Service in this case, as adopted by the Court of Appeals for the Federal Circuit and manifest in the government's brief in opposition to the petition before the Court, is totally contrary to the very precepts of openness and predictability that the United State has heretofore fostered. The position of Customs in this case tosses aside clear statutory language and seeks to insert unforeseen conditions to the trade law at issue.

Moreover, as pointed out in our brief in chief and as supported by the *amicus* parties, HTSUS item 9802.00.80 was intended by Congress to be expansive to trade. Until the Federal Circuit decided *General Motors*, 976 F.2d 716 (Fed. Cir. 1992), the courts had regularly struck down efforts by Customs to restrict the use of the law. Instead, the courts interpreted the statute to promote the manufacture and use of United States-made components exported for foreign assembly. The government's position in this case is contrary to the congressional policy of expanding United States production of components used in assembly abroad and is oblivious to the adverse economic effects of its position.

II. THE QUESTION PRESENTED IS SIGNIFICANT AND APPLICABLE IN MANY INDUSTRIES

Remarkably, counsel for the government has argued that the Supreme Court need not decide this case on a writ of *certiorari* because the North American Free-Trade Agreement renders motor vehicles imported from Mexico duty-free upon importation. According to the United States, the issue, therefore, lacks continuing significance. Brief in Opposition at 4, 12.

In reality, not all vehicles imported from Mexico (or Canada) are entitled to duty-free entry under the NAFTA. Presently, trucks imported from Mexico that qualify for preferential duty rates under the NAFTA are subject to a duty ranging from 3.4% to 17.5% *ad valorem*. 19 U.S.C. § 1202, Harmonized Tariff Schedule of the United States, USITC Pub. 2232, items 9906.87.01-.04 ["HTSUS"]. For the government to present NAFTA-related duty reductions as a cornerstone of its position underscores the weakness of its contentions.

In addition, this case raises questions affecting motor vehicles manufactured outside North America. HTSUS item 9802 applies to imports whatever the country of final assembly. The participation of the Association of International Automobile Manufacturers as *amicus curiae* is evidence of the global importance of this question.

Finally, the government ignores the significant impact this question has on other industries. Tariff item 9802 is not restricted to automobile imports; it can apply to any product assembled abroad with United States-origin components. This fact explains the presence of the American Apparel Manufacturers Association, the United States Association of Importers of Textiles and Apparel, the

American Iron and Steel Institute and the American Association of Exporters and Importers as *amici curiae*. None of these associations are directly in the motor vehicle industry and all represent importers with interests throughout the world.

The interests of the textile industry are very much in issue. The Court of International Trade recently decided *Haggar, Inc. v. United States*, 20 CIT ___, Slip Op. 96-110 (Jul. 12, 1996) (Court No. 93-06-00343). That case shows the failed attempt by the Customs Service to apply the unclear doctrine of *General Motors* to non-automotive industries. The period in which to appeal that decision has not yet elapsed but we expect that the United States will appeal thus increasing the need for a decisive opinion from the Supreme Court on the proper analysis of 9802.00.80.

III. THE GOVERNMENT'S STATUTORY ANALYSIS IS INCORRECT

The United States begins its statutory analysis with the concession that "cleaning" and "lubricating" are "inherently minor operations. . . ." Brief in Opposition at 5. "Painting" appears in the statute in exactly the same context as cleaning and lubricating. Customs and the courts, therefore, should interpret these words in the same manner. Thus, Congress must also have considered "painting" an inherently minor operation. The hoary principle *noscitur a sociis* dictates this conclusion.[1]

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[1] This principle is closely related to *ejusdem generis* which teaches that a list of specific examples controls the scope of the general terms in a statute. *Norfolk & W. Ry. Co. v. American Train Dispatchers' Assoc.*, 499 U.S. 117, 129 (1991). The

(continued...)

Jarecki v. Searle & Co., 367 U.S. 303, 307 (1961) (the meaning of a word can be discerned from the accompanying words).

The word-game hypotheticals the United States proffers to counter Chrysler's statutory analysis are inapposite. First, the hypothetical statute requiring the extermination of "all rabid animals such as dogs and raccoons" does not mean, as the United States asserts, that only rabid dogs and raccoons are subject to extermination. Such a statute, if enacted, would require the extermination of all dogs and raccoons based upon the incorrect premise that dogs and raccoons are necessarily rabid. The only reason the government's example appears to mean something other than what it says is that the reader knows that not all dogs and raccoons are rabid and, therefore, can discern the intended meaning. The United States, armed with a preconceived notion as to the meaning of the word "painting" in 9802, is similarly seeing a meaning that does not appear in the statute.

Another reason the government's hypothetical statute does not advance its interpretation is that it is a hypothetical rather than an example drawn from the HTSUS. Chrysler is unaware of any use of the phrase "such as" in the HTSUS where the examples that follow are not specific examples of articles or processes defined as fitting within the general term preceding "such as." Because the statute must be read *in pari materia*, the fact that an alternative interpretation may exist for a hypo-

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[1] (...continued)
use of "cleaning, lubricating and painting" as examples of acceptable incidental operations, therefore, are the dog wagging the broad statutory tail of other "operations incidental to assembly." *See* Brief in Opposition at 5-6

thetical statute has no bearing on the meaning of the phrase in this statute. The tariff schedule should be given its clearest meaning. To do so renders it reliable by concerned businesses and our trading partners.

The second hypothetical the United States puts forward is the absurd circumstance of an importer sending canvas abroad where an artist will paint a picture and "incidentally" assembly it into a frame. Chrysler's statutory interpretation would not permit an importer to enter the artwork with the benefit of 9802 because another provision of the statute prevents it. Subpart (b) limits the duty exemption to United States-origin components that "have not lost their physical identity in such articles by change in form, shape or otherwise. . . ." HTSUS item 9802.00.80. The canvas under a Da Vinci is no longer a mere piece of canvas but has merged into the artwork and has lost its physical identity as a canvas. This is distinct from a truck hood or other vehicle part that, even after painting, does not lose its physical identity. The statute, therefore, specifically avoids the very absurdity the United States has raised.

In its brief in opposition, the United States failed to address Chrysler's contention that Customs' current statutory analysis leads to absurd results and a statute that is impossible to administer fairly. The quantitative comparisons the Federal Circuit required in *General Motors* conflict significantly with all of the prior case law concerning "operations incidental to assembly" under 9802 and its predecessor. The new test, based on cost comparisons that are not logically related to finding whether a non-assembly operation is "incidental to assembly" will produce unpredictable results and cause a substantial increase in the costs associated with administering this duty preference.

Despite its attempt to portray Chrysler's statutory analysis as extreme and without support, the United States has not shown that *General Motors* and *Chrysler* are correct interpretations of the statute. To the contrary, Chrysler has consistently shown its interpretation to be more in keeping with this Court's precedents and prior decisions of the Court of Appeals for the Federal Circuit. Those decisions, when construing the scope of 9802, have been inclusive rather than, as Customs would urge, restrictive. As such, we respectfully submit that the Supreme Court should grant this petition for a writ of *certiorari* to review the Federal Circuit's decision.

IV. THERE IS NO NEED TO RESORT TO LEGISLATIVE HISTORY

The United States correctly asserts that "[b]ecause the language of HTSUS, read in context, answers the question presented by this case, there is no need to consult the legislative history for further guidance." Brief in Opposition at 7. The fact that Chrysler and the government have arrived at conflicting views of the statute does not mean that the statute is necessarily ambiguous. Ambiguity arises out of the language and context rather than the mere assertion of conflicting meaning. *Brown v. Gardner*, 115 S.Ct. 552, 555 (1994). Therefore, without convincing proof that Chrysler's affirmative arguments based on many rules of construction are wrong, the Court should forgo an analysis of legislative history.

Should the Court wish to delve more deeply into congressional intent, Chrysler states only that it agrees with the arguments presented by *amici curiae* American Apparel Manufacturers Association, et al. at pages 5 through 8 of their brief. In deference to the Court, Chrysler will not repeat those arguments here. Because

the decision below conflicts with the plain language of the statute and Supreme Court precedent on statutory interpretation, Chrysler respectfully requests that the Supreme Court accept this case for review.

V. THE DECISION BELOW IMPROPERLY IGNORES A BINDING REGULATION AND THE TRIAL COURT'S FINDING OF FACT

The government fails to explain how the limitation on significant processes in 19 C.F.R. § 10.16(c) migrated into the more specific subsection (b) which specifically permits preservative painting. The fact that the reference to preservative painting appears in the first section without limitation suggests that Customs, which drafted the language, intended that subsection (b) be unconditional. Customs intended that businesses engaged in trade, such as Chrysler, be able to rely on this regulation. The Customs Service and the courts should not add new conditions into the regulation on an *ad hoc* basis.

Moreover, the fact that a regulation must be read in conformity with judicial interpretations of the statute does not mean that the agency need not abide by the regulation. Upon finding that the statute limits the scope of acceptable painting operations,[2] the Federal Circuit should then have decided whether the existing regulation properly interprets that limitation. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S.

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[2] In raising arguments regarding the regulations, Chrysler does not mean to imply that the statute is actually ambiguous with regard to painting. Rather, these arguments are presented on the assumption that the Court may find the statute to be ambiguous. In that case, Customs properly promulgated 19 C.F.R. § 10.16 to administratively define incidental painting.

837, 844-45 (1984). In *General Motors*, however, the Federal Circuit ignored the regulation and, therefore, usurped the role of the agency administering the HTSUS. *Id.* at 844 ("a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency") (footnote omitted).

Chrysler submits that 19 C.F.R. § 10.16 reflects Customs' decision to permit preservative painting in the context of 9802.00.80 and, further, that the regulation is a permissible construction of the statute if "incidental" is found to limit the meaning of "painting." The apparent rationale for the regulation is that preserving the assembled article is closely related to the assembly process; it may even be necessary to make the foreign assembly process worthwhile. The physical or chemical improvement of a component, which the regulation excludes in subsection (c)(3), is more similar to non-assembly fabrication or completion of the component. Thus, operations of that nature are not "incidental" to assembly in the sense that those operations are not closely related to the assembly process. Similarly, painting that is primarily intended to enhance the appearance of an article or to impart distinctive features or characteristics is not closely related to assembly. It is more similar to improving the finished article. Those operations, therefore, are not incidental to assembly.

Customs made a rational policy decision to interpret a statute it viewed as ambiguous. Customs then subjected that decision to notice and public comment and published it as a binding regulation. Accordingly, the Customs Service is now bound to adhere to that regulation and should not be permitted to fabricate arguments to cir-

cumvent it. *Fort Stewart School v. Federal Labor Relations Auth.*, 495 U.S. 641, 654 (1990).

In rejecting the application of 19 C.F.R. § 10.16(b), the Federal Circuit also improperly rejected a finding of fact the trial court made after a trial *de novo*. The trial court judge, after hearing expert testimony and personally viewing the production facilities in Mexico, found that Chrysler's application of paint was 70% directed toward preserving the assembled vehicle. *Chrysler Corporation v. United States*, 19 CIT. ___, Slip Op. 95-39, 5 (Ct. Int'l Trade Mar. 13, 1995) (Petition App. at 11). The United States did not challenge this finding on appeal and it should have been binding on the appellate court unless "clearly erroneous." *C. Itoh & Co., Am. v. United States*, 678 F.2d 218, 220 (1982). Nevertheless, the Federal Circuit rejected this finding. *Chrysler Corporation v. United States*, Appeal No. 95-1366, 6 (Petition App. at 5-6) ("Chrysler has not persuaded us that its painting operations were not significant or that they were not intended to enhance the appearance of or to impart distinctive characteristics to the sheet metal parts.").

The Federal Circuit has usurped the position of the agency by nullifying a regulation that is in conformity with its interpretation of the statute. It has also erred by overruling a finding of fact that was not clearly erroneous. As a result, further review by this Court is necessary to correct these serious departures from precedent.

CONCLUSION

The question presented is of continuing importance to importers of goods assembled abroad using United States-origin components and to the United States-based manufacturers of those components. In addition, the

question is of concern to a wide range of industries beyond motor vehicle manufacturing including textile, home appliances, construction equipment, electronics and others.

Furthermore, the United States has not presented convincing arguments that the plain meaning of tariff item 9802 limits incidental painting operations to those that are "minor" in light of the comparisons set out in *General Motors*. Based upon the statutory analysis set forth here and in its petition, Chrysler submits this case presents an important question that the Court should review. Concerning the regulation, the Federal Circuit improperly permitted the Customs Service to ignore its otherwise binding regulation and rejected an undisputed finding of fact by the trial court. These aspects of this case also present substantial and important questions worthy of review by this Court.

Based on all of the forgoing, Chrysler submits that the Supreme Court should grant its petition for certiorari.

Respectfully submitted,

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